No. 97-174

In the Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA, et al,
Petitioners,
v.
LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE TRIBES OF FOREST COUNTY POTAWATOMI COMMUNITY, EASTERN BAND OF CHEROKEES, and TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

AMICI CURIAE TRIBES WOULD STATE THE ISSUE AS FOLLOWS:

WHETHER INDIVIDUAL PARCELS OF PROPERTY, OVER WHICH A TRIBE EXERCISES TERRITORIAL DOMINION, CAN BE SUBJECTED TO THE TAXING JURISDICTION OF THE STATE ABSENT A CLEAR ABROGATION BY CONGRESS, OR A CESSION BY THE TRIBE, OF ITS SOVEREIGNTY.

TABLE OF AUTHORITIES

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INTEREST OF THE AMICI CURIAE[1]

This case presents the question of whether the States and their political subdivisions may impose *ad valorem* taxes on fee patented lands located within the territory of an Indian Tribe irrespective of whether those lands are acquired and subsequently regulated by the governing Indian Tribe or owned individually by its members.

While the issues in this case involve lands within a Tribe's territorial boundaries in the State of Minnesota, the decision of this Court will have far reaching impacts on almost every Indian Tribe in the United States. The policy of allotment has had continuing adverse effects on the sovereignty of Tribes since its first legislative enactment notwithstanding the policy's repudiation by subsequent legislation. The resultant effects place Tribes in an increasingly precarious position exposing its future as a sovereign government to uncertain and significant risk. Because sovereignty is inextricably tied to territory, this vulnerability of such sovereignty through land foreclosure actions on certain parcels by States and their political subdivisions results in the systematic erosion of what remains of tribal sovereignty, an impact clearly unintended by Congress as evidenced by its intervening legislation since the Dawes Allotment Act.

More particularly, each of the Tribes represented in this brief will be directly affected by the decision of the Court in this case due to either the present existence of a scattering of fee-patented lands located within their Reservation boundaries or the recent acquisition

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[1]The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary constribution to the preparation and submission of this brief.

of lands immediately adjacent to, or located within, their present land base. This impact will be measured not only in terms of the future status of their land holdings. Rather, and more significantly, the consequences will impact the effectiveness on Tribes' ability to exercise complete dominion over their own territory pursuant to their own Constitutions and pursuant to post-allotment legislation which reflects the federal government's Indian policy of self-determination, sovereignty, and control over Indian country.

The reduction in the local tax base is of minimal consequence when measured against the broader, more far-reaching effects suffered by Tribe governments as a result of the ability of States to further dismantle their land base through taxation. Moreover, requiring Tribes to pay, through ad valorem taxes, for local services, typically not always commensurate with the taxes paid as evidenced by the expansion of Tribal services, places Tribes in a "catch-22" situation. One of the essential tools to self-government, the power of taxation, will be judicially foreclosed in the face of existing federal statutes encouraging Tribes' efforts to sustain their sovereignty and vitality.

Whenever a government decides to exercise its taxation authority, it must be able to do so without excessive interference from other governments. If another governmental entity can defeat its taxing power on illogical and unprecedented legal grounds, the Tribes' taxation power is rendered useless. Thus, contrary to the *Yakima* Court's opinion that the mere power to assess and collect a tax on real estate is not disruptive of tribal self-government, in actuality, Tribes, at the very least, will lose much needed income from revenue-raising tools normally relied upon by other governments to maintain their sovereignty, which will result in a systematic collapse of their government and vitality. Their cultural patrimony will be lost. Their democratic political processes and relationships regarding their own citizens and their governments will go unexercised. Economic development will be stifled. From

intestate death to intestate death, child by child, acre by acre, blood degree by blood degree, by furthering the legacy of allotment, the current Indian law jurisprudence will ensure that Tribes, their members, and their sovereignty spiral toward a slow but certain demise.

SUMMARY OF ARGUMENT

"You own the stars?"
"Yes."
"But I have seen a King who ...."
"Kings do not own, they reign over; it is a very different matter."
Antoine de Saint Exupery, The Little Prince, 55 (Katherine Woods trans., 1943).

The Tenth Amendment to the United States Constitution represents the guiding principles and logic of the American federalist system. That provision declares that the States and their citizens are the source of the Union's powers, granting certain powers to the Union and reserving all inherent, residual powers. The Tenth Amendment's logic is based upon two tenets of American federalism. First, the original thirteen States pre-existed the Union and, second, republican democracy requires that the power to govern derives from people. Invoking both tenets of American federalism, one American jurist wrote: "State bills of rights are first in two senses: first in time and first in logic."[2]

The Supreme Court has explained that the United States of America recognizes the inherent sovereignty of the Tribes for the same two reasons. First, Tribes pre-existed the United States and the original thirteen States and thus they derive their sovereignty from

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[2] Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 370, 380 (1980).

outside the U.S. political sphere. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Second, the United States invokes American notions of republican democracy, that Tribes derive their sovereignty from the governed within a politically recognized territory. *Talton v. Mayes, 163 U.S. 376 (1896) National Farmer's Union v. Crow Tribe, 471 U.S. 845 (1985) Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, 492 U.S. 408 (1989). In this regard, the foundational relationship between the Tribes and the United States is similar to the foundational relationship between the States and the Union.

The States formed their relationship with the Union and each other through the Constitution, while the Tribes generally formed their relationship with the Union and the States through treaties. Nevertheless, in language remarkably similar to the Tenth Amendment the Supreme Court has imputed its wording and logic into the treaty-based relationship between the U.S. and the Tribes. The Court wrote "In other words, the treaty was not a grant of rights to the Indians, but a grant rights from them -- a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). In other words, the Tribes pre-existed the Union and the States and, in light of republican democracy, represented the source of America's powers over the Tribes and the reservoir of the Tribes' inherent powers not granted to the United States in treaties.

Therefore, Tribes originally possessed full sovereignty to govern their territory, including holding land communally as public domain or establishing and regulating a system of private property. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823) the Chief Justice wrote, "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws." *Id.* at 593. This statement in *Johnson* recognizes that Tribes inherently possessed the inherent sovereign power to govern territory, maintain a public domain, issue

title, regulate that title, and rescind that title. *Id.*[3]

However, Court opinions have declared with increasing frequency that Tribes are no longer possessed of the full sovereignty that they once maintained. According to Court opinions, Tribes possess inherent sovereignty that has not been voluntarily relinquished in treaties or agreements,[4] abrogated by Congress[5], or deemed inconsistent with their status.[6] *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978). As an added measure of Tribes' governance, Congress may delegate certain governmental powers to Tribes. *U.S. v. Mazurie*, 419 U.S. 544 (1975). Therefore, the inquiry should be: 1) whether, in treaties, the Leech Lake Band of Chippewa has relinquished its inherent sovereign power to reacquire and return property within its territory to its public domain; 2) whether Congress has ever abrogated such powers; 3) whether the exercise of such powers by Tribes is inconsistent with their status; or 4) whether Congress has ever delegated that authority to Tribes. The answer is, indisputably and undeniably, that 1) Tribes have never relinquished such inherent sovereign authority under their Treaties; 2) Congress has never abrogated that authority; 3) the exercise of such powers are completely consistent with the Tribes' status; and 4) such delegation is unnecessary because Tribes still possess such

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Johnson's holding was that "the courts of this country" could not sustain such a title granted by an unrecognized Tribe, particularly when that same Tribe subsequently ceded the territory accompanying the property at issue to the United States.

[4] This normally was accomplished by treaty or other agreement, generally with the consent of theTribe.

[5] Treaty provisions obligate the United States to protect the Tribes, externally and internally, thus providing a measure of authorization for congressional abrogations.

[6] The Court also preserved a place for judicial activism in this arena.

powers.

I. I. THE LEECH LAKE BAND OF CHIPPEWAS HAS NOT RELINQUISHED IN ANY TREATY ITS INHERENT SOVEREIGN POWER TO REACQUIRE AND RETURN LAND WITHIN ITS TERRITORY TO ITS PUBLIC DOMAIN.

The Court has invoked American political thought specifically regarding treaties dealing with Tribes' land. The Court once explained, "To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). In the treaty between the United States and the Leech Lake Band of Chippewa the Tribe did not relinquish its inherent sovereign powers to govern its territory to the extent recognized in *Johnson v. Mc'Intosh*. *Id.* Therefore, the Tribe retains the power to acquire property within its territory and return that property to the Tribe's public domain.

The Tribe possesses the inherent power to authorize the United States and the State of Minnesota to impose ad valorem property taxes on allotments within the Tribe's territory. For example, the Court decided in *Goudy v. Meath*, 201 U.S. 146 (1906), that the State of Washington could impose an ad valorem property tax upon allotted land. However, in *Goudy* the Court relied upon specific treaty provisions in which the Puyallup Tribe authorized Congress to allot the reservation and to allow the State to impose such property taxes. *Goudy v. Meath*, 201 at 149. The treaty with the Leech Lake Band of Chippewa contains no provision authorizing either allotment or State taxation. Therefore, at the very least *Goudy* supports the contention that the Leech Lake Band of Chippewa did not authorize State taxation. Indeed, the absence of any authorizing language such as that relied upon in *Goudy*, that case suggests that

the General Allotment Act and the Burke Act's amendments were, in their entirety, unconstitutionally applied to the Leech Lake Band of Chippewa. The Leech Lake Band of Chippewa did not relinquish in any treaty the power to govern their territory, including the power to acquire private property within its territory for return to the Tribe's public domain.

II. THE EXERCISE BY TRIBES OF THE POWER TO ACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN IS NOT INCONSISTENT WITH THEIR STATUS.

Tribes' reacquisition of land within their territory for public domain purposes is not "inconsistent with their status." For example, many reservations were not subjected to allotment. Moreover, most reservations that were subjected to allotment were not allotted in their entirety. As a result, unallotted or partially allotted reservations continue to contain tribal public domain lands entirely consistently with the Tribe's status. Moreover, in the Indian Civil Rights Act of 1968, Congress expressly acknowledged that Tribes maintain their own public domain, including exercising eminent domain.[7] Furthermore, in the Indian Land Consolidation Act, Congress specifically encouraged a policy of returning certain individually-held property interests to the Tribe's domain. 25 U.S.C. §2201. Therefore, the reacquisition and return of fee lands to the Tribe's public domain is entirely consistent with the Tribe's status.

Indeed, it would be inconsistent with their status to treat the Tribe as just another private landowner due to the Court's increasing concern with basic republican democracy, due process, and political

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[7] "No Indian Tribe in exercising powers of self-government shall: (5) take any private property for a public use without just compensation" Indian Civil Rights Act of 1968, 25 U.S.C., § 1302.

participation in the relationship between the States and the Tribes and their respective citizenries. In *Oliphant v. Suquamish Tribe*,435 U.S. 191 (1978), *Duro v. Reina*, 495 U.S. 676 (1990); *Brendale v. Confederated Tribe of Yakima*, 492 U.S. 408 (1989), the Court ruled against the Tribe's exercise of governing power over non-Members because their limited ability to participate in Tribe government. Yet the Tribe's ability to participate in the county's government is non-existent. Indeed, the Tribe's members' ability to participate in the county's government is impractical and antithetical to notions of republican democracy.

Congress has never made clear that the Tribe's members are citizens of the States and their subdivisions. The Constitution and the Fourteenth Amendment exclude "Indians not taxed," in reference to member Indians who live on their Tribe's reservation. The Indian Citizenship Act of 1924 and the various allotment acts extended national citizenship to Indians, including "Indian not taxed", but these acts did not extend State citizenship to such Indians. 8 U.S.C., § 1401(b). The reasoning behind these provisions comports with basic notions of republican democracy: those who did not bear the civic responsibilities of citizenship and government (taxation) should not benefit from the rights and privileges of citizenship and government, i.e. voting and holding office. Tribes and their resident members neither bear the responsibilities of State citizenship nor enjoy the rights of State citizenship.

Tribes and their members could enjoy the benefits of State citizenship only to the derogation of the basic axiom that government is by the governed. If resident members of the Leech Lake Band could fully participate in county processes, they could vote against any property taxes whatsoever or they could vote to increase them dramatically. Since most of them live on individually held trust property, they would not be affected either way. Meanwhile, the county's property taxes fund its public schools. Yet, the Tribe's members do not attend the county's public schools.

Indeed, a member of the Tribe who resides on trust land without property taxes could run for and win public office in the county. She would then be in the position of making laws by which she could not be forced to live.

Therefore, the county should not be able to tax the Tribe's land because the Tribe cannot participate in the county government. Indeed, the county should not be allowed to tax the property of the Tribe's members.

a. Lands Acquired by the Tribe Pursuant to Section 465 of the IRA Are Exempt From State and Local Taxation.

The Indian Reorganization Act of 1934 provided for restoring unallotted surplus Indian lands to tribal ownership. 48 Stat. 984, 25 U.S.C. § 463. In addition, the IRA authorized "reacquisition of allotted lands in trust." Furthermore, this reacquisition could be "within or without existing reservations." See § 465. The land at issue was reacquired by the Tribe pursuant to its IRA constitution and § 465.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court decided that the Tribe must pay State income taxes derived from land acquired under § 465; however, the Court also decided that the Tribe need not pay personal property taxes on improvements attached to the land acquired under §465. In *Mescalero* the Court's latter holding rested squarely on an underlying presumption that tribally-held property was not subject to State taxation.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court based its affirmation of the State's ability to tax the gross receipts on revenues earned from an off-reservation Tribal enterprise but not on personalty that had been installed as a permanent improvement at the resort on the IRA. Section 465 exempts land acquired by a Tribe from local taxation. As previously stated, the

intent and purpose of the Reorganization Act was to 'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' H.R. Rep. No. 1804, 73d Cong.,2d Sess.,6 1934). Senator Wheeler specifically stated that:

> "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians *the control of their own affairs and of their own property*; to put it in the hands either of an Indian Council or in the hands of a corporation to be organized by the Indians ...." 78 Cong Rec. 11125.(emphasis added).

As articulated in *Mescalero*, notwithstanding the facts that the case involved lands not technically acquired in trust for the Indian Tribe, the IRA precludes the State from imposing its ad valorem taxes on property owned by the Tribe and on personalty permanently attached to the realty. *Mescalero*, 411 U.S. at 154. The Court reasoned that the IRA "did not strip Indian tribes and their reservation lands of their historic immunity from state and local control." and 'Nothing in this Act shall be construed as rendering the property of any Indian community ... subject to taxation by any State or subdivision thereof . . ..' *Id.*, (quoting from the predecessor bills to the Wheeler-Howard Act, H.R. 7902 and S. 2755, Tit. I, s 11. Id. at 5.)

III. CONGRESS HAS NEVER ABROGATED THE INHERENT POWERS OF THE TRIBE TO REACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN.

The Court has recognized the power of the United States to limit the Tribes' sovereignty. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). Nonetheless, the Court has analyzed congressional acts

against the backdrop of treaties and the ensuing relationship between the United States and Tribes. In that light, the Court has required that such congressional statements be "unmistakably clear".

Assuming, *arguendo*, that Yakima stands for the proposition that the GAA and the Burke Act authorized State taxation of property held by the Tribe, Congress has never acted to abrogate the sovereign power of the Leech Lake Band of Chippewa to place such property back into the Tribe's public domain. Indeed, while the GAA has effectuated a private property system within the Tribe's boundaries, the acts did not abrogate the Tribes' inherent sovereign powers to govern that private property system or to regulate those allotments. As the Solicitor of the Department of the Interior, the federal administrative entity with primary responsibility over U.S. relations with Indian Tribes, wrote: "A tribe has the sovereign power to, among other things, regulate and perhaps proscribe use of reservation resources, including allottee resources."[8] Therefore, Congress has never abrogated the Tribe's inherent sovereign power to acquire private property within its territory and to return that property to the Tribe's public domain.

a. The General Allotment Act Of 1887 Did Not On Its Face Authorize State Taxation Of Allotments

Although the Court has held the Dawes Act's allotment process constitutional,[9] the provisions invoked by Cass County have never been upheld without treaty authorization. Cass County's reliance upon *Goudy* supports this contention. *Goudy* arose out of an 1854 treaty which expressly contemplated an action by Congress to allot the reservation and to authorize State taxation. *Goudy*, at 149.

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[8] Memorandum of Law by Solicitor of the U.S. Department of the Interior, John D. Leshy, dated March 30, 1995.

[9] *In re Heff*, 197 U.S. 488 (1905).

The treaty in *Goudy* provided for allotment, adding that such allotments "shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until the State constitution ... and the legislature of the State shall remove the restrictions." Id. The treaty between the United States and the Leech Lake Band of Chippewa contains no such authorizing provision.

Furthermore, the 1854 treaty in *Goudy* provided that "No State legislature shall ... remove the restrictions herein provided for, without the consent of Congress." *Id.* Thus, the 1854 treaty, which was negotiated by the Executive Branch and ratified by the Legislative, reveals the mutual understanding that before the U.S. could infringe upon Tribes' sovereignty, the infringement must first have been authorized or consented to. To suggest that the allotment acts obtain the same results without such prior treaty authorization is to render the 1854 treaty fortuitous. Therefore, the *Goudy* analysis suggests that the General Allotment Act was an unconstitutional exercise of congressional power, both in its allotment and taxation provisions. Such a conclusion would comport with republican democracy's fundamental tenets of authorization and consent.

Nonetheless, even assuming that the GAA is generally constitutional, its provisions must be construed in light of the treaties, general rules of statutory construction, and federal policy. For example, the term "State law" in the GAA does not necessarily mean State jurisdiction. For example, in the Major Crimes Act, 25 U.S.C. § 1153, Congress wrote: "As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State." Yet, neither the Executive nor the Court have ever interpreted this application of State law as also extending State jurisdiction. For another example, the Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), recognized that the Organized Crime Control Act "makes certain violations of State and local gambling laws violations of federal law." However, the Court then added, "[t]here is nothing in the OCCA indicating that

the States are to have any part in enforcing [the OCCA]." *California v. Cabazon Band of Mission Indians*, 480 U.S. at 212. Moreover, where Congress has intended to extend State jurisdiction it has done so unambiguously. In Public Law 83-280 Congress expressed its intent to apply State law and extend State jurisdiction, providing: "The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses in Indian Country to assume such measures of jurisdiction, and the criminal laws of such State shall have the same force and effect as elsewhere in the State." Therefore, the GAA is not unmistakably clear and it applies only State law, not State taxation, and certainly not State jurisdiction.

IV. THE GENERAL ALLOTMENT ACT AND SUBSEQUENT LEGISLATION HAS NOT WAIVED TRIBES COMMON LAW IMMUNITY FROM SUIT.

Assuming again arguendo that the GAA allowed a permeation of the Tribe's sovereign sphere by allowing States to foreclose tax-delinquent land held in fee by individual allottees or their successors, a position to which Amici Tribes do not concede, that is an immeasurable distance from holding that the GAA abrogated the immunity of the Tribe itself, once the Tribe reacquires fee parcels or places its own parcels in fee.

"Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 435 U.S. 49, 58 (1978). "Although Congress has occasionally authorized limited classes of suits against Indian Tribes, it has never authorized suits to enforce tax assessments." *Oklahoma Tax Commission v. Citizens Band Potawatomi*, 498 U.S. 505, 510 (1991). The result reached in *Oklahoma Tax Commission* rested squarely on the doctrine of tribal sovereign immunity and the Court refused to narrowly construe the doctrine and to even abandon it in its entirety. *Id. at* 510. Moreover, the Court has recognized Congress' continuing approval of the

immunity doctrine. *Id.* at 510 (citing the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451 *et. seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §450 *et seq.* Against the backdrop of inherent Tribal governmental powers, this Court has utilized the rules for employing a waiver of tribal immunity identical to the rules applied for employing a waiver of state or federal immunity "because no principled reason requires a different treatment." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

Nothing in either the GAA or the Burke Act or the legislative history, confers upon states the authority to impose any of its laws on a Tribe government. Notwithstanding the Acts' purpose to assimilate Indians into the mainstream culture, Congress maintained and distinguished the existence and continuing vitality of the sovereignty of Tribes' over their territory with individual Indians, who had the choice of maintaining their political alliance with their Tribe or severing those ties entirely. [cite to Section 6 of the GAA]. Moreover, Section 5 specifically reflects this acknowledgment by explicitly reserving the Tribes' rights to release any surplus lands it may choose to sell within its territory for homesteading purposes.

While this acknowledgment became legislatively effectual with the enactment of the IRA, Executive branch officials have consistently recognized that Indian tribes possess all the attributes of a sovereign necessary to control economic activity within its jurisdiction and to effectively manage its territory, 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 1855), including the jurisdiction to tax, 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

> "Chief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members

> of the tribe and over non-members as far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." *Ibid.*

Further, this Court has recognized that "Indian Tribes within Indian Country are a good deal more than 'private, voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This distinction between Tribes as governments and Indian people as individuals is crucial to the finding that Congress did not confer any state authority over Indian Tribes. What the Petitioners beg the Court to imply in the GAA is a congressional diminishment of a Tribe from its governmental status to a status equivalent to a taxable subdivision of the State simply by the Tribe's mere existence within the State's boundaries. This logic flies in the face of long-standing precedent and numerous legislation specifically preserving and enhancing the Tribes' governmental status and encouraging exercise of its governmental sovereign powers. *See supra note 11.* This acknowledgment of the territorial imperative to tribal sovereignty is reflected in the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303, which affirmed the Tribes' right to take land into their public domain. Section 1302(5) specifically requires a Tribe to provide just compensation for any private property over which it may exercise eminent domain.

Notwithstanding the Petitioner's unsupportable position, the resultant impact would divest the Tribes of the ability to create programs and initiate governmental action within their territory to implement the legislative provisions and other objectives inherent in the self-determination policy. In *Buster v. Wright*, 135 F. 947 (CA8 (1905), the Court concluded that "[n]either the United States, nor a state, *nor any other sovereignty* loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial*

jurisdiction by citizens or foreigners." 135 F., at 952. (emphasis added). This notion reflects the integral role of territory and collective rights in sovereign governments, and the continuing vitality of Tribe governments is dependent upon the Courts recognition of this principle. This, when measured against the protectable collective right of the Tribes in the present case, identifies two independent but related barriers to the exercise of state authority within the territory of an Indian Tribe, state's authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions. *Bracker,* 448 U.S. at 152, *(*citing U. S. CONSTITUTION. art. I, §8, cl.3*)*. Moreover, the Court has set forth well-established principles prohibiting individual states from levying taxes on Indian or tribally-owned property. *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198,1203 (1997)(citing *McClanahan,* 411 U.S. 164, 170-71 (1973), *Oklahoma Tax Commission*, at 366-67; *Confederated Tribes of Colville,* at 152, *Moe*, at 480-81, *Industrial Uranium Co. v. State Tax Comm'n of Arizona,* 95 Ariz. 130, 134, 387 P.2d 1013, 1015-16 (1963).

By focusing on the narrow inquiry of who owns the title to a particular parcel, the *Yakima* Court wholly ignored the quintessential power inherent in territory. This departure from generally accepted powers to regulate derives from a perspective that does not view territory as a constitutive element of group identity. The Tribes' rights are not derived solely from membership based principles, but from the fact that territory is politically contingent and a vital component of self-governance. Territory is imperative to tribal sovereignty.

The Court's long line of precedent invoking the Canons of Construction, federal preemption doctrine, and the "unmistakably clear intent" rule, and Congress' policy of Tribal self-determination all would be unilaterally reversed were States allowed to systematically foreclose against every parcel owned by the Tribe or its members and thereby reduce the Tribe's tax base. Taxation of a

Tribe is tantamount to diminishment, and the Court has set forth specific prerequisites to diminishment, not the least of which is just compensation. *Solem v. Bartlett*, 465 U.S. 463 (1984) *Hagen v. Utah,* 510 U.S. 399 (1994). Notwithstanding, the first governing principle is that "[o]nly Congress can divest a reservation of its land. *Id. at 470.* Moreover, once land has been set aside for an Indian Reservation, irrespective of the title of individual plots within the Tribe's territory, "the entire block retains its reservation status until Congress explicitly indicates otherwise." *See United States v. Celestine,* 215 U.S. 278, 285 (1909). The statutory definition of Indian country as all lands within the limits of Indian reservations reflects the principle that "Indian country" is not a concept simply relegated to property, but territory. Thus, by looking at Indian sovereignty by determining who owns individual parcels of the soil, rather than viewing it in terms of the territorial bounds of the sovereign, reduces Tribes to little more than "private, voluntary organizations." *U.S. v. Mazurie*, 419 U.S. at 557.

As the twenty-first century approaches, Tribes across the continent have, as a matter of practicality and necessity, continued to utilize that sovereign power within their territories. Tribes utilize their territorial governance as any other government does, to encourage productivity, to regulate land use, to site housing projects, landfiils, hospitals, and lagoons, and to preserve the public domain.

Any sovereign possesses the prerogative to acquire fee land and to continue to hold it in fee. If a Tribe acquires fee land outside its reservation, that land continues to be held in fee by the Tribe and is subject to taxation by the jurisdiction in which it sits. However, if a Tribe acquires fee land inside the reservation, the legal outcome is not so clear. A Tribe's fee ownership of on-reservation lands raises issues of jurisdiction, taxation, and sovereign immunity.

Thus, if a Tribe acquires non-Member owned, on-reservation fee land which has been legally determined to be subject to State

taxation and continues to hold that land in fee status, then that land may be subject to continued taxation. This, at least, represents the facts presented by *Yakima*.

However, if a Tribe acquires land within the reservation and chooses not to continue to hold the land in fee, but to return the land to its public domain, that too is its sovereign prerogative. After all, land within a Tribe's reservation that acquires fee status does not necessarily fall outside the Tribes' domain. The Court's decisions in Montana and Brendale illustrate that land may be held in fee, even by non-members of the Tribe, and still be subject to the Tribe's governance. Indeed, the Court's opinion in Yakima, which limited the State's taxation to the land itself and disallowed the excise tax, further shows that the Tribe continues to hold some measure of territorial governance over these parcels of individually held private property.

Therefore, one attribute of the Tribes' governance must be to acquire land in fee and return it to the Tribe's public domain, as any other sovereign might do. Unlike the Tribe in *Yakima*, the Leech Lake Band returned the reacquired parcels back into its public domain. In fact, Cass County acquiesced to this arrangement and did not pursue taxation on the parcels until the *Yakima* decision.

If the Court imposes a fee ownership upon the Tribe, as opposed to holding the land as part of the Tribe's public domain and trust, then the Tribe will be forced, as a Tribe, to act collectively in carrying out the primary purposes for which the ILCA was enacted -- to return the land to economic productivity. Rather than as a government, redistributing the land into private hands to be held individually, to foster individual entrepreneurship. If the Court insists that Tribes hold land as a private owner rather than as a governing sovereign, the Court will have stifled the ability of the Tribe to re-issue title to land to truly private parties in order to make it economically productive. In short, the Court will have imposed

communism upon the Tribes.

Part of the confusion evolves from the misuse of the term "trust" in many case involving Tribes. The territories which constituted the Tribes' public domain are not in "trust" in the same sense that individually held allotments are held in trust. The General Allotment Act applied the legal term "trust" only to the individually-held allotments established by that Act. However, the term "trust" has also, mostly in the scholarship, been analogically applied to lands within the tribes' territory which were not allotted -- that is, lands held either collectively or privately under the Tribes' governance prior to the GAA -- simply because such lands contained some characteristics of trust allotments contained, i.e., could not be acquired by anyone but the United States. While this use of the term "trust" presents a convenient analogy, it is also an misapplication of the term.

Historically, this right to acquire the Tribes' territory belonged to the discovering European nation. Prior to the American revolution England, France, and Spain fought wars over this discovery right. However, upon declaring and winning their independence, the colonies succeeded to the rights of discovery formerly held by the European governments. Subsequently, upon forming the United States, they in turn granted that discovery power to the Union in the Commerce Clause. Finally, to codify matters, the Federal government promptly enacted the Trade and Intercourse Act which restricted to itself all acquisition of Tribe territories.

Therefore, it is because of the Discovery doctrine and its progeny -- delegation to the Union by the States in the Commerce Clause and codified in the Trade and Intercourse Acts -- that the territories or lands held collectively by the Tribe are not subject to acquisition by foreign states, the several States of the Union, or their individual citizens. The General Allotment Act did not restrict the acquisition of such lands. Thus, such lands are not subsumed into

that property concept of "trust" in the sense that the word is applied to individually held allotments.

If, in the commerce clause, the States can have authorized Congress to unilaterally acquire Tribes' territory and grant it to a State, then certainly those same States can have authorized Congress to also acquire lands within a State and return it to a Tribe. Otherwise, what principle of republican democracy would recognize in Congress more power over those who do not authorize that power than over those who do authorize that power? Further, Congressional authorization must be read to authorize the acquisition and consolidation of lands as Tribes hold lands.

This background is necessary for three reason:

1) restriction on acquisition versus restraint on alienation
2) Tribes govern territories and hold lands in a public domain and trust

V. CO-EXISTENT STATUTES MUST BE INTERPRETED IN LIGHT OF INTERVENING LEGISLATIVE ENACTMENTS.

a. The *Yakima* court misapplied the "per se" rule regarding State taxation in Indian Country and therefore must be overturned.

First, the Court in *County of Yakima* v. *Yakima Indian Nation*, 502, Us. 251 (1992), examined the General Allotment Act, ch. 119, 24 Stat. 388 (1887)(hereinafter "GAA") and held that state taxation authority was conferred with respect to fee-patented Indian lands by Section 6 of the Act which provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *24 Stat. 390*, *Yakima*, at 689-93. Second, it held that such authority was not terminated by the subsequently enacted Indian Reorganization Act of 1934, 25 U.S.C. secs. 461-

479(1988)(hereinafter "IRA") because Congress chose not to return allotted lands to their pre-allotted status. *Id.* Irrespective of the Amici Tribes' position that the transfer of taxation laws of the State does not automatically confer the State's jurisdiction, the Court's long-standing reliance upon federal preemption was ignored in *Yakima*.

b. Federal Pre-emption Analysis is the Correct Standard to Apply to the question of whether the States have the taxation authority over Indian Tribes and their members.

Under the Supremacy Clause, from which the preemption doctrine is derived, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962). Clearly, the state's taxation authority must derive from enacted law. Such taxation authority flowing from such law is in direct conflict with subsequent legislation specifically enacted to counter the devastating effects of the allotment policy. Congress has enacted numerous statutes intended to counter the destructive effects felt by the allotment era. [10]

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[10]Notwithstanding the most stark example of repudiation of the allotment policy and its effects in IRA, *see e.g.* The American Indian Agricultural Resource Management Act, 25 U.S.C. 3701-3745 (1994)(requiring agricultural practices in Indian Country to be more responsive to the political processes of the Tribes); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988)(providing for the maximization of tribal jurisdiction over state jurisdiction in adoption and child custody proceedings involving tribal members or those eligible for tribal membership); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988) (providing for a comprehensive regulatory scheme over bingo and other gambling operations in Indian Country, specifically to promote tribal economic

Further, the Court has consistently held in a long line of Supremacy Clause cases that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. *See Perez v. Campbell*, 402 U.S. 637 (1971); *Hines v. Davidowitz*, 312 U.S. 62 (1941). The Court's refusal in *Yakima* to impart any weight to the numerous, complex, intervening statutes that unequivocally reflect an undisputed transition in federal Indian policy contravenes the very principal upon which the Supremacy Clause and statutory interpretation cases are premised.

In the case of *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991), the issue was whether the term "attorney's fee" in sec. 1988 provided explicit statutory authority for reimbursement of expert witness fees. In finding that no authority existed, the Court based its reasoning on congressional intent embodied in previously and subsequently enacted law.[11] The Court viewed its role as making

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development, tribal self-sufficiency, and strong tribal government); Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607 (codified in scattered sections of 26 U.S.C.)(granting to Tribes a favorable tax status similar to local and state governments, intended to enhance tribal economic development); Indian Land Consolidation Act, 25 U.S.C., §§ 2201-2211 (1988)(establishing a scheme for Tribes to expand and consolidate their land holdings); Native American Languages Act, 25 U.S.C. §§ 2901-2906 (Supp. II 1990)(acknowledging the special status of Native Americans, which recognizes "distinct cultural and political rights, including the right to continue separate identities.").

[11]This portion of the amicus argument relies on the reasoning used in the *West Virginia* opinion, not the specific holding in this case. Congress passed the Civil Rights Act of 1991, 25 U.S.C. sec. 1301-1341, specifically to prospectively produce an outcome opposite to the holding in *West Virginia*. While Congressional acts can change future results, they do not technically reverse the holding or

"sense rather than nonsense out of the corpus juris", it not being their "function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. *Id.* at 101. Rather than making sense out of the contradictions embodied in the allotment policy and the congressional attempts to mitigate the damage[12], the *Yakima* Court based its opinion on its own intuition that "it would be 'strange' for land to be alienable and encumberable yet not taxable." *Yakima*, at 690-691. While Congress may have acted strange, it is equally strange for the Court to infer congressional intent on their own second sight while maintaining an unmistakably clear intent standard. This reasoning flies in the face of previously held cases which rejected judicial enlargement of a statute. This Court has stated that to "to supply omissions transcends the judicial function." *Id.* (citing *Iselin v. United States*, 270 U.S. 245, 250-251 (1926).

The implications of state taxes imposed on transactions and activities occurring on Indian reservations was analyzed in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979). The Court reached the conclusion that the state's taxes are applicable to purchases made by nonmembers against the backdrop of the overriding federal interest,

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reasoning of a case already decided in its absence. *Crumley v. Delaware State College*, 797 F.Supp. 341, 344 n.2 (D.Delaware 1992). Thus, it is appropriate to rely on the same reasoning used in the *West Virginia* decision without regard to the effect of the subsequent federal act.

[12]*See generally* Institute for Gov't Research, The Problem of Indian Administration 3-51 (1928), making numerous findings on the failure of the assimilationist policy and concluding that the administration of Indian policy neither encouraged nor supported Indian self-sufficiency, and accordingly, recommended immediate resolution of this deficiency. *Id.* at 21-22.

stating that "tribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States." *Id. at 154.*

This Court has consistently relied upon a flexible pre-emption analysis "sensitive to the particular facts and legislation involved. *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176 (1989). Moreover, the determination of whether federal legislation has preempted state taxation, "primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process." *Cf. Rice v. Rehner,* 463 U.S., 713, 719 (1983)(quoting *McClanahan,* 411 U.S. at 172). It logically follows that each case "requires a particularized examination of the relevant state, federal, and tribal interests." *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 838 (1982). In examining the various interests, however, the Court has held that "although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Id.*

Thus, the Court's accurate analysis to the question of whether a State may encroach upon Tribe's sovereignty by taxing its land requires recognition of, and consideration for, the long standing federal policies adopted to correct the devastating effects of the allotment era and sanction the integrity of the Nation's Indian Tribes.

Finally, part of the preemption analysis includes not only the specific law in question but the state law's actual effect, *English v. General Electric Co.*, 496 U.S. 72 (1990) (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) and where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *English,* the Court held that a state tort claim was not pre-empted by a federal whistle-blower provision because the state

law did not have a "direct and substantial effect" on the federal scheme. *English*, 496 U.S. at 85.

With the IRA, Congress officially halted the allotment actions and formally repudiated the assimilation policy. While it is undisputed that Congress did not restore fee-patented or homesteaded lands to tribal ownership, it is understandable in light of the vast number of acres lost, *See Francis P. Prucha, The Great Father*, (abridged ed. 1986), and Congress' refusal to grant immunity from state taxation to non-Indian landowners. Thus, halting the allotment process can best be viewed as a choice by Congress to effectuate a less daunting task to reversing the irreparable damage caused by allotment and not as an implied continuance of State taxation authority upon Tribes. Through the IRA, Congress established a new federal Indian policy, supplemented by subsequent legislation, which promotes tribal autonomy and self-determination. *"The Forgotten American": The President's Message to the Congress on Goals and Programs for the American Indians, PUB. PAPERS 335 (1968-69).*

Our precedents leave no doubt that state and local laws enacted for the purpose of diminishing Tribes' land bases have a "direct and substantial effect on the federal scheme to "promote tribal self-determination, economic development and cultural plurality." [13] The taxation by states and local governments of land governed by an Indian Tribe or owned by its members defeat the congressional purpose and must not be allowed. The conception of Tribe sovereignty that this Court has consistently reaffirmed permits no other conclusion.

CONCLUSION

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[13] *See* Cohen's Handbook of Federal Indian Law, 147 (Rennard Strickland et al. eds., 1982)(describing congressional reasoning behind the IRA).

In recent years, the Court has given little or no heed to congressional goals of Tribe self-determination in analyzing Tribes' authority over activities and land within their territory, slowly eroding any meaningful execise of self-government. It has inconsistently applied the canons of construction. It has inconsistently applied or wholly ignored the well-established preemption doctrine and "unmistakably clear" intent rule, picking and choosing when it is applied and when it is not, as evidenced by the long line of non-Indian law cases, which are consistent in their reliance on such precedent. It has resurrected the long repudiated allotment era to deprive tribes of lands set aside by Congress and reserved in the Treaties as tribal territories. More significantly, it has ignored the plenary power in Congress and residual tribal sovereignty in the tribes. By holding that the States may not encroach upon a Tribe's sovereignty and diminish its land base through taxation, the Court will advance toward removing the analytical flaws set forth in *Yakima* adhering to the well-established interpretive rules, precedent, and federal policy.